Supreme Court, U.S.
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NO. 00-1349

IN THE
SUPREME COURT OF THE UNITED STATES

JERRY LAYNE ROGERS, SR.,
Petitioner,

v.

MICHAEL W. MOORE,
Secretary, Florida Department of Corrections, State of Florida,

BRADLEY D. CARTER,
Warden, Union Correctional Institution, Raiford, Florida,
Respondents.

On Petition For Writ Of Certiorari To The
United States Court of Appeals for the Eleventh Circuit

REPLY BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI

Jerrel E. Phillips
P.O. Box 14463
Tallahassee, FL 32317
(850) 877-8660

John G. Buchanan III
Timothy C. Hester*
Mark E. Porada
COVINGTON & BURLING
1201 Pennsylvania Avenue, NW
Washington, DC 20004-2401
(202) 662-6000
* Counsel of Record
Attorneys for Petitioner

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ARGUMENT

I. THE PETITION PRESENTS A FEDERAL QUESTION.

The State argues in its opposition that Rogers's Petition "is a matter of Florida law," and therefore "[t]here is no federal question here." (State Br. at 6-7.) But Rogers is not raising a state law claim. Rather, the claim is that Rogers was denied his federal right to the effective assistance of counsel, guaranteed by the Sixth and Fourteenth Amendments, because his lawyer failed to raise a claim of reversible error under state law on direct appeal.

A defendant may be deprived of his federal constitutional right to the effective assistance of counsel when a lawyer fails to object to violations of state law or to raise meritorious state law claims on direct appeal. Numerous cases confirm this proposition. *See, e.g., Evitts v. Lucey*, 469 U.S. 387, 389-90 (1985) (finding counsel constitutionally ineffective for failing to comply with state procedural rules on direct appeal).[1]

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[1] The appellate claim "whose omission forms the basis of an ineffective assistance claim may be either a federal-law or a state-law claim." *Mayo v. Henderson*, 13 F.3d 528, 533 (2d Cir. 1994). *See also Newsted v. Gibson*, 158 F.3d 1085, 1093 n.6 (10th Cir. 1998) (state law claim "appropriately raised in this habeas petition because it arises in the context of a claim of ineffective assistance of appellate counsel"), *cert. denied*, 119 S. Ct. 1509 (1999); *Chateloin v. Singletary*, 89 F.3d 749, 754 (11th Cir. 1996) (analyzing the merits of state law claim, to determine whether appellate counsel was constitutionally deficient for failing to raise that claim on direct appeal); *Atkins v. Attorney General*, 932 F.2d 1430, 1432 (11th Cir. 1991) (analyzing state evidentiary rules and finding counsel constitutionally deficient for failing to raise an objection under state law).

An appellate lawyer's failure to spot a reversible error of state law is no less ineffective assistance than the failure to spot a federal law issue. It is the ineffective assistance, not the particular source of legal error, that deprives the defendant of rights guaranteed under the Sixth and Fourteenth Amendments. Here, Rogers was denied his federal right to the effective assistance of counsel because his lawyer failed to raise an obvious claim of reversible error under state law -- the trial court's violation of Fla. R. Crim. P. 3.111.

II. ROGERS'S CLAIM IS NOT PROCEDURALLY DEFAULTED.

The State argues again, as it has several times below, that Rogers's federal habeas corpus petition is procedurally barred because the Florida District Court of Appeal that rejected Rogers's state habeas corpus petition might have based its decision on state procedural rules. In fact, the Florida court denied the State's motion to dismiss Rogers's petition as untimely under state law. Therefore, the state court's subsequent ruling necessarily was a decision on the merits of the claim.

The State also argued before the Florida court that the statute of limitations for post-conviction motions brought under Fla. R. Crim. P. 3.850 should have barred Rogers's claims of ineffective assistance of appellate counsel raised in a state habeas corpus petition. However, under longstanding Florida law, claims of ineffective assistance of appellate counsel must be raised through an original petition for writ of habeas corpus filed in the state court that heard the direct appeal. *See Smith v. State*, 400 So. 2d 956, 960 (Fla. 1981); *Knight v. State*, 394 So. 2d 997, 999 (Fla. 1981). Accordingly, the two-year limitations period provided in

Fla. R. Crim. P. 3.850 had no bearing on Rogers's claims of ineffective assistance of appellate counsel.[2]

That background explains why the Florida District Court of Appeal denied the State's motion to dismiss Rogers's habeas corpus petition as untimely or procedurally barred. The court's subsequent denial of Rogers's habeas corpus petition was necessarily a decision on the merits, because the court had already denied the State's motion to dismiss the petition as untimely. The Eleventh Circuit expressly rejected the State's argument for procedural default below, stating that "we must assume that the state appellate court considered the petition on the merits since it did not clearly and expressly rely on an independent and adequate state procedural ground to dismiss the petition." (App. A10.) *See, e.g., Coleman v. Thompson*, 501 U.S. 722, 735 (1991) (federal review is not procedurally barred if "the decision of the last state court to which the petitioner presented his federal claims fairly appeared to rest primarily on resolution of those claims . . . and did not 'clearly and expressly' rely on [procedural default]").

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[2] Florida courts have routinely decided the merits of original state habeas corpus petitions filed years after expiration of the two-year period of Fla. R. Crim. P. 3.850. *E.g., Groover v. Singletary*, 656 So. 2d 424, 424-25 (Fla. 1995) (deciding merits of habeas petition filed ten years after ruling on direct appeal, and nine years after the filing of Rule 3.850 motion); *Byrd v. Singletary*, 655 So. 2d 67, 67-68 (Fla. 1995) (deciding merits of habeas petition filed nine years after the decision on direct appeal, and seven years after the filing of a Rule 3.850 motion); *Breedlove v. Singletary*, 595 So. 2d 8, 8-10 (Fla. 1992) (deciding merits of habeas petition filed ten years after the decision on direct appeal and ten years after the filing of a Rule 3.850 motion).

III. SUBSEQUENT FLORIDA CASE LAW HAS NOT ABROGATED THE REQUIREMENT TO RENEW THE OFFER OF COUNSEL UNDER FLA. R. CRIM. P. 3.111.

A. Counsel's Performance Must Be Assessed Under the Prevailing Case Law at the Time of Appeal

The Eleventh Circuit was required to assess counsel's performance by the legal standards in effect at the time of counsel's actions. "A fair assessment of attorney performance requires that every effort be made to eliminate the distorting effects of hindsight, to reconstruct the circumstances of counsel's challenged conduct, and to evaluate the conduct from counsel's perspective at the time." *Strickland v. Washington*, 466 U.S. 668, 689 (1984) (emphasis added). "Thus, a court deciding an actual ineffectiveness claim must judge the reasonableness of counsel's challenged conduct . . . viewed as of the time of counsel's conduct." *Id.* at 690 (emphasis added).

The State argues that this Court's holding in *Lockhart v. Fretwell*, 506 U.S. 364 (1993), justifies the Eleventh Circuit's reliance on Florida case law decided after Rogers's direct appeal in assessing counsel's performance. In fact, this Court expressly held in *Lockhart* that it was "necessary" to judge counsel's effectiveness by the legal standards in effect as of the time of counsel's actions, and stated that the Court had "adopted the rule of contemporary assessment of counsel's conduct" under *Strickland*. *Id.* at 371-72. The Eleventh Circuit clearly erred in judging Rogers's counsel's performance by the standards of cases decided years after the time of Rogers's direct appeal.

As set forth in Rogers's Petition, numerous cases, rendered months or even years before the time of Rogers's direct appeal, had held that the failure of a trial court to renew the offer of counsel under Fla. R. Crim. P. 3.111 required reversal. Not a single reported Florida

decision as of that time had held otherwise. (Rogers Br. at 14-20.) The State (Br. at 21-22) attempts to distinguish certain cases on the basis that they only involved reversals of sentences, not convictions. But in those cases the trial court failed to renew the offer of counsel at sentencing. In this case, in contrast, the trial court also failed to renew the offer of counsel during the critical pre-trial and trial phases, so that reversal of Rogers's conviction would have been required if the claim had been raised on direct appeal. *See* Rogers Br. at 14-20.

B. The Involvement of Standby Counsel Does Not Excuse Counsel's Failure to Raise this Claim on Appeal

The State speculates that Florida courts would have reached a different result on Rogers's appeal -- contrary to every case decided by that time -- because Rogers had standby counsel. But the law is clear that standby counsel do not serve as counsel and do not fulfill the Sixth Amendment entitlement to counsel.[3] And Fla. R. Crim. P. 3.111 is explicit that the offer of counsel must be

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[3] *See United States v. Taylor*, 933 F.2d 307, 312 (5th Cir. 1991) ("Given the limited role that a standby attorney plays, we think it clear that the assistance of standby counsel, no matter how useful to the court or the defendant, cannot qualify as the assistance of counsel required by the Sixth Amendment."); *Maynard v. Meachum*, 545 F.2d 273, 277 (1st Cir. 1976) ("whatever label is attached" to standby counsel, "the net result" is that the defendant "had less than the full representation by counsel to which, absent a valid waiver, he was entitled"); *State v. Frye*, 617 A.2d 1382, 1385 (Conn. 1992) ("[b]y taking charge, the defendant has forfeited the right to have an attorney make the critical strategic and tactical decisions pertaining to the defense, and has thus waived the right to counsel," whether or not standby counsel is available) (quotation omitted).

renewed at each stage of trial when the defendant appears without counsel.

Here, Rogers appeared without counsel at each stage of the trial. The presence of standby counsel – who did not serve as his counsel[4] – thus could not satisfy this specific requirement of Florida procedure. Reflecting this point, Florida courts have held that the presence of uninvolved standby counsel does not alter the requirements of Fla. R. Crim. P. 3.111. *See, e.g., Payne v. State*, 642 So. 2d 111, 112 (Fla. Dist. Ct. App. 1994). Given that unbroken line of precedent, it was inexcusable for counsel to fail to raise this argument on Rogers's behalf.

C. The Case Law Subsequent to Rogers's Appeal Does Not Overcome or Eliminate the Prejudice from Counsel's Failure to Raise this Claim.

The State argues that Florida cases decided after the time of Rogers's direct appeal support the Eleventh Circuit's conclusion that Fla. R. Crim. P. 3.111 does not universally require reversal for failure to renew the offer of counsel. Under *Lockhart v. Fretwell*, a subsequent change in case law can bear on the prejudice prong of a *Strickland* claim to the extent that the change limits or abrogates the claim that counsel unreasonably failed to raise. The prejudice prong "focuses on the question whether counsel's deficient performance renders the result of the trial unreliable or the proceeding fundamentally unfair." 506 U.S. at 372. If a subsequent development in the law no longer recognizes the right that counsel failed to raise, then "unfairness does not result." *Id.*

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[4] Rogers conducted the entire defense, while standby counsel functioned solely in an advisory capacity. *See* Rogers Br. at 7.

The Eleventh Circuit did not rely on subsequent case law to assess whether Rogers had been prejudiced by counsel's deficient performance. Rather, it looked to subsequent case law to conclude that counsel's performance had not been deficient. This was clearly contrary to the "rule of contemporary assessment of counsel's conduct" established in *Strickland* and reiterated in *Lockhart v. Fretwell*, 506 U. S. at 371-72.

In any event, the subsequent case law does not eliminate the prejudice from counsel's failure to raise a claim under Fla. R. Crim. P. 3.111 on direct appeal. Although some subsequent Florida decisions have found narrow exceptions to the absolute requirement of reversal for failure to renew the offer of counsel, those exceptions do not apply to the facts of this case. Even today, the failure to renew the offer of counsel, on the facts presented here, is reversible error under Florida law. Thus, unlike *Lockhart v. Fretwell*, here counsel's performance was both unreasonable and prejudicial even if viewed in light of subsequent case law.

In particular, the State relies on *Rogers v. Singletary*, 698 So. 2d 1178 (Fla. 1996) (State Br. at 11-13), a state habeas corpus proceeding following Rogers's conviction and death sentence in St. John's County.[5] In that case, Rogers argued that his appellate counsel was ineffective for failing to argue on direct appeal that the trial court violated Fla. R. Crim. P. 3.111 by not renewing the offer of counsel to Rogers in his murder prosecution (where he represented himself *pro se*). The Florida Supreme Court rejected that claim, and found no violation of Fla. R. Crim. P. 3.111, because the trial court had "appointed two prominent

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[5] The Florida Supreme Court has recently reversed Rogers's 1984 murder conviction based on evidence that the State improperly withheld from the defense. *Rogers v. State*, Case No. 91,044 (Fla. Feb. 15, 2001).

attorneys as standby counsel who appeared with Rogers at each stage of the proceedings." *Id.* at 1180 n.2.

The concurring judge specifically noted "the unusual circumstances" presented by the facts of that case. *Id.* at 1181 (Anstead, J., concurring).[6] Most notably, the two lawyers who were appointed to represent Rogers in that trial were not "uninvolved 'standby' counsel, but rather [were] active and responsible co-counsel." *Id.* at 1181-82. When appointed, the lawyers stated on the record that they would not be merely "assisting" Rogers but would be "participating" in the defense. *Id.* at 1181 n.3. "Indeed, the entire penalty phase of the trial was conducted by the lawyers appointed to represent petitioner." *Id.* Thus, "[s]ince the trial court had actually provided the defendant with counsel, the court could hardly be expected to remind the defendant that he had a right to have counsel appointed for the penalty phase of his trial. Further, since counsel . . . conducted the entire penalty phase, petitioner would be hard pressed to demonstrate prejudice about not being informed of his right to the assistance of counsel in the penalty phase." *Id.* at 1182. (emphasis added).

Here, the trial court expressly limited appointed counsel's role to an "advisory capacity," and directed that counsel "would not be responsible for the

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[6] The State argues that this Court should disregard the concurring opinion in *Rogers v. Singletary* because the concurrence was not the law of the case. Although the concurring opinion is not itself binding authority, it can be cited and relied upon to help explain the facts or reasoning of the court's opinion. *See Pulmosan Safety Equipment Corp. v. Barnes*, 752 So. 2d 556, 557-58 (Fla. 2000); *Coalition for Adequacy & Fairness in School Funding, Inc. v. Chiles*, 680 So. 2d 400, 406 (Fla. 1996); *In re Forfeiture of 1976 Kenworth Tractor Trailer Truck*, 576 So. 2d 261, 262 (Fla. 1990); Kogan & Waters, *The Operation and Jurisdiction of the Florida Supreme Court*, 18 Nova L. Rev. 1151, 1172-73 (1994).

conduct of the trial." Rogers himself conducted the entire trial, from beginning to end. Appointed counsel did not question a single witness, give opening or closing arguments, conduct voir dire, or in any other way assume a role in the trial.

This case is therefore totally unlike *Rogers v. Singletary*. Where counsel has been "actually provided," as in *Rogers v. Singletary*, renewal of the offer of counsel is not required. Here, Rogers was not represented by counsel. Therefore, the explicit requirements of Fla. R. Crim. P. 3.111(d) -- applicable "at each subsequent stage of the proceedings at which the defendant appears without counsel" -- required renewal of the offer of counsel.

The Florida courts have specifically noted the limited scope of the exceptions to the mandatory requirement of Fla. R. Crim. P. 3.111 and have restricted those exceptions to situations where (a) the defendant used his waiver of counsel to disrupt the proceedings or (b) where standby counsel actually engaged in a substantive role at trial. In *State v. Roberts*, 677 So. 2d 264 (Fla. 1996), the court stated that "under normal circumstances, rule 3.111(d)(5) requires a trial court to advise a *pro se* defendant of the right to counsel at each subsequent stage of trial." *Id.* at 265. The court declined to reverse only because an application of the rule to the facts of that case would have led to an "absurd result" and would have permitted the defendant to "abuse the dignity of the court or to frustrate orderly proceedings," *id.* at 266, because the defendant had displayed a pattern of disrupting the trial by repeatedly changing positions as to whether he wanted counsel or wanted to proceed *pro se*. *See also Norman v. State*, 699 So. 2d 854, 854 (Fla. Dist. Ct. App. 1997); *Beard v. State*, 751 So. 2d 61, 62 (Fla. Dist. Ct. App. 1999).

Here, the State has conceded that Rogers did not disrupt the proceedings. And standby counsel was appointed in an "advisory" capacity only, and served no role in Rogers's trial. Therefore, even under current Florida

law, Rogers would be entitled to reversal based on the trial court's failure to renew the offer of counsel. Except where these narrow exceptions are established, Florida cases decided after the time of Rogers's appeal have consistently reversed convictions or sentences because of the failure to renew the offer of counsel to a *pro se* defendant. *See* Rogers Br. at 18 n. 8.

IV. ROGERS'S FEDERAL HABEAS CORPUS PETITION WAS TIMELY.

The State argues that Rogers's federal habeas corpus petition was untimely under the one-year statute of limitations imposed by 28 U.S.C. § 2244. Rogers's claim of ineffective assistance of appellate counsel was timely filed in state court on November 6, 1995. Accordingly, the federal habeas corpus statute of limitations was tolled from April 1996 (when it went into effect) through August 28, 1996, when the petition was denied by the Florida Fifth District Court of Appeal. Rogers's federal habeas corpus petition, filed less than one year later, on August 24, 1997, therefore was timely under 28 U.S.C. § 2244(d).

The State also inserts a one-sentence argument that "potentially significant transcripts of pertinent pre-trial hearings may have been lost due to Rogers's delay" in filing his state habeas corpus petition. (State's Br. at 24.) This argument has been raised and rejected by every court below. In any event, the existence of any additional pre-trial transcripts would have no bearing on Rogers's claim here -- that the trial court failed to renew the offer of counsel after Rogers waived his right to counsel at the start of trial.

CONCLUSION

For the foregoing reasons, as well as those set forth in Rogers's Petition, the petition for writ of certiorari should be granted.

Respectfully submitted,

Jerrel E. Phillips
P.O. Box 14463
Tallahassee, FL 32317
(850) 877-8660

John G. Buchanan III
Timothy C. Hester*
Mark E. Porada
COVINGTON & BURLING
1201 Pennsylvania Avenue, N.W.
Washington, D.C. 20004
(202) 662-6000

* Counsel of Record
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